No. 13,865

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

RENE BUSSOZ,

Appellee.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED

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Jurisdictional Statement.

(a) The United States District Court for the Southern District of California had jurisdiction by virtue of 8 U. S. C. 701 (Jurisdiction to Naturalization), and the matter came before the Court on the Motion of the United States of America for an Order denying the Petition of Rene Bussoz, a citizen of France, for naturalization [Tr. 5].

(b) This Court has jurisdiction by virtue of 28 U. S. C. 1291 (Final Decisions of District Courts).

Statement of Facts.

The appellee feels that there are certain facts contained in the partial record on appeal which are essential to an understanding of the case in addition to those which are set forth in the Statement of Facts in the appellant's brief and therefore sets forth herewith his own statement of facts.

Rene Bussoz, the appellee herein, was born March 13, 1906, in Paris, France, a native and national of that country. Between May 6, 1929 and July 16, 1929, a period of slightly more than two months he served in the French army, all of which time was spent in a hospital and at the conclusion of which time he was discharged permanently for reasons of health [Tr. 4, 112].

Rene Bussoz came to the United States as a permanent resident on December 6, 1939, with the intention of becoming a citizen [Tr. 3, 43]. He filed his declaration of intention to become a citizen of the United States five months later on May 8, 1940 [Tr. 111].

He brought with him the right to manufacture in this country certain diving equipment which is used by the Underwater Demolition Teams of the United States Navy. This Aqua-Lung is unique equipment which affords much more effective performance under water. Commander F. D. Fane, U. S. N., testified that in developing this equipment appellee's sincerity went "above dollars and cents" and that he picked out business missions in the interest of the country [Tr. 35-39, 58].

As soon as required by law, the appellee registered with the Selective Service System [Tr. 43].

At first he was too old to be called under the then existing regulations. When the age was raised he was sent a questionnaire, Selective Service Form No. 304 "Alien's Personal History and Statement" to fill out [Tr. 45].

Form No. 304 contains under Section XI "Statement of Alien" the following blank to be filled in "41. I ..... object to service in the land or naval forces
(do, do not)
of the United States." Appellee had read in the papers and seen in the movies reports of the Germans shooting hostages, and taking people to concentration camps and he felt that he would not be protected by the rules of war if he were captured by the Germans, since he had been compelled to sign an oath not to join any armed force before being allowed to leave France [Tr. 45, 71].

At this time the appellee had three members of his immediate family residing in France, in that portion which was occupied by the Germans [Tr. 113]. He feared that the Germans would take reprisal against his family if they heard that he had even indicated his willingness to serve in the armed forces of the United States [Tr. 32]. He therefore desired to complete question 41 by having it state "I do object to service in the land or naval forces of the United States" [Tr. 46]. The Chairman of his draft board insisted that if he did this he would be required to fill out Selective Service Form No. 301 'Application by Alien For Relief From Military Service" [Tr. 46]. This form was applicable only to citizens of neutral countries.

The appellee was aware of the possible consequences of signing Form No. 301, he testified "if I were a neutral I would be barred forever to become a citizen. If I were

not a neutral, I wouldn't be" [Tr. 46]. The appellee did not believe that France was a neutral [Tr. 32, 34, 46]. He tried to explain to the draft board that France was not a neutral [Tr. 46]. He tried to explain it many times [Tr. 46]. He finally was sent by the draft board to one of its official advisors [Tr. 47, 29] Samuel J. Crawford. He explained his whole problem to the draft board official [Tr. 47]. Mr. Crawford believed that he was "very sincere" [Tr. 34]. He explained to Crawford his problems and his belief that France was a neutral [Tr. 31-32]. Crawford told him to object [Tr. 47] and completely worded for the appellee the Affidavit [Ex. C, Tr. 117] which was prepared because of appellee's concern that he might in the future have difficulty about his United States citizenship [Tr. 31, 47].

In doing all this he relied upon and followed the advice of the draft board official, as to the best means to protect his rights to become a citizen [Tr. 46, 47].

This occurred on April 5, 1943 [Tr. 114]. France had been at war with Germany since September 3, 1939, with Italy since June 11, 1940, and with Japan since December 8, 1941. Diplomatic relations between the U. S. A. and Vichy were severed by the United States State Department on November 8, 1942 [Ex. 1]. On that very day, April 5, 1943,

> "Allied and United States made an air raid on the Krupp works at Essen and followed it up with a day air attack on the Renault plant at Billancourt near Paris, dropping 900 tons of bombs. It was reported that 133 planes took part in the Renault raid, and that four ton explosives were showered at the Krupp plant at the rate of six a minute. The Allies lost 21 bombers. Of the Renault raid Berlin

said the population suffered several hundred dead and wounded. Vichy said 400 persons were killed" [Ex. 6].

On October 26, 1944, the appellee was reclassified 4A, that is, over age for military service [Tr. 120].

Then Paris was liberated and the De Gaulle regime recognized as the true French. The appellee described his immediate conduct as follows:

> "Well, when the liberation of France was released in the press, I immediately got in touch with Mr. Crawford and asked him for an appointment, and as quick as I got an appointment came to talk to him and said in my heart I couldn't see any reason any more for me objecting to the service as my family was not any more in the German lines * * *" [Tr. 49].

Or as Mr. Crawford put it, "he wanted to * * * join the United States Army. * * *" [Tr. 33].

Once again the draft board official counselled him, and prepared for him the document by which he offered his services [Tr. 33]. That is Exhibit E which reads as follows:

"November 6, 1944.

Local Board, No. 15,
New York County
570 Lexington Avenue
New York 22, New York

Re: Rene Bussoz—Order No. 1245A

Gentlemen:

Under date of April 8, 1944, I was classified as 4-CH and again on October 26, 1944, I was reclassified as 4-A.

If you will refer to my reasons for requesting the 4-CH classification which were contained in affidavits sent to you at the time of signing my questionnaire, you will find the reasons therein set forth which prompted me at that time to decline to serve in the military forces of the United States (I being a citizen of France).

In the last week the situation has changed in France to the point where the reasons I gave for my deferment and classification do not now exist and *I would like very much now to have myself classified as being willing to serve in the armed forces of the United States and to be placed in whatever classification the Board cares to place me.*

It would seem convenient that you should transfer this application to the Santa Monica Board No. 243 in whose jurisdiction I now live and have lived for the past three years for whatever further action they wish to take in reference to my reclassification.

I trust you will give the matter your immediate attention and *will advise me if there is anything further I must do other than the request made in this letter.*

Yours very truly,
/s/ Rene Bussoz." (Emphasis added.)

The draft official testified that this was done at Bussoz' request and as an attempt to present himself for service in the United States Army [Tr. 33]. The appellee testified as follows as to his understanding of the meaning of the letter:

"Q. And he told you that was the proper procedure for presenting yourself for service, is that

right? A. He told me this was the only way I had to prove to this Country my sincerity and I signed" [Tr. 56].

The appellee never received any reply to this letter [Tr. 50].

This letter was written on November 6, 1944. As of November 9, 1944, according to the official United States army reports, the United States casualties had been 509,195. At the end of the war the total casualties were 1,070,452, that is to say more than half of the casualties occurred after the date on which the appellee "offered my services immediately."

The appellee obtained a copy of letter of opinion from the State Department [Ex. 4] and sent it to his draft board which after a time returned to him a photostatic copy of his notice of intention to become a citizen, or "first papers" so that he could take steps to become a citizen [Tr. 56-57]. On the advice of the Immigration officials he waited two years before proceeding, and on the 16th day of September, 1947, the petitioner, Rene Bussoz, applied for citizenship and on the 15th day of May, 1952, the Immigration and Naturalization Service made a motion to deny his petition and thereafter, commencing on the 21st day of July, 1952, hearings were conducted in the District Court on the petition. Only a portion of those proceedings appear in this record on appeal. The petition was ordered granted on the 29th day of September, 1952, and the defendant was admitted to citizenship on December 12, 1952.

Summary of Argument.

I. Appellee's execution of the DSS Form No. 301 cannot affect his right to become a United States citizen because the execution of that form was a nullity since appellee was not then a citizen of a neutral country.

A. France was not a neutral country at the time appellee signed DSS Form No. 301. This was correctly determined by the District Judge based upon persuasive evidence that this political question had been decided in appellee's favor by the Executive branch of the government.

B. The Selective Service Regulations do not give any basis for deciding the question of France's neutrality or non-neutrality differently than did the District Judge.

II. Where the appellee has at all times acted toward the appellant openly and consistently and has relied upon the advice of appellant's agent in choosing his course of action, the appellant cannot raise the issue of estoppel upon appeal.

A. The record shows that appellee at all times told the Government that France was not a neutral, and that he did just what the Government's agent told him to do in order to advise the Government of his position and to protect his rights.

B. The record shows that the issue of estoppel was not raised in the trial court; it cannot be raised here on appeal for the first time.

ARGUMENT.

I.

Appellee's Execution of DSS Form No. 301 Cannot Affect His Right to Become a United States Citizen Because the Execution of That Form Was a Nullity Since Appellee Was Not Then a Citizen of a Neutral Country.

The objection by the Government to appellee's admission to citizenship was based (in so far as we are now concerned with it) upon the fact that he had executed a DSS Form No. 301, "Application By Alien For Relief From Military Service." The basis for the objection is the language of Section 3a of the Selective Service and Training Act of 1940 as amended (54 Stat. 885, 50 U. S. C. App. 303(a)):

> "* * * Provided, that any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: * * *."

The cases are clear and uniform in their holding that the mere execution of DSS Form No. 301 does not, of itself, always mean irrevocably that the alien who executes it cannot thereafter become a citizen. There are certain

types of situations in which the execution of the form is held to be a nullity.

McGrath v. Kristenson, 340 U. S. 162, 71 S. Ct. 224, 95 L. Ed. 173 (1950);

Moser v. United States, 341 U. S. 41, 71 S. Ct. 553, 95 L. Ed. 729 (1951);

Machado v. McGrath, 193 F. 2d 706 (1951);

Mannerfrid v. United States, 200 F. 2d 730 (1952);

Petition of Ajlouny, 77 Fed. Supp. 327 (D. C. E. D. Mich., 1948).

The cases which hold that it is a nullity because the alien was ignorant of the meaning of his act do not apply directly to this case because here the appellee knew that if he was a neutral at the time he signed the No. 301 Form, it would bar him from citizenship [Tr. 46]. (*Moser v. United States, Machado v. McGrath,* and *Mannerfrid v. United States,* all *supra.*) But the cases do not limit themselves to this basis. They further hold that an alien who for any reason does not fit the description of the statute will not be debarred from citizenship even though he has executed the DSS Form No. 301.

The leading case on this point is *McGrath v. Kristenson, supra,* which holds that even though an alien has been determined by the Selective Service System to be one who by virtue of his residence in the United States must come under its jurisdiction and the alien therefore signs the DSS Form No. 301 the District Court can review the question of his residence and if he is found not to have been a "male person residing in the United States," as provided in Section 303(a), then the Form No. 301 is a nullity.

A case squarely on the point before the Court here is *Petition of Ajlouny* (*supra*) in which the District Court re-examined the question of whether the petitioner's native country was a neutral country and contrary to the ruling of the Selective Service System ruled that it was not a neutral and admitted the Alien to citizenship in spite of his execution of the DSS Form No. 301.

In fact the Government does not quarrel with this general proposition and accepted it repeatedly in the trial court [Tr. 62, 63, 64, 75] and apparently accepts it in this appeal. On this phase of the appeal the Government's argument is that the question of France's neutrality was not one that could be decided by the trial court. *Petition of Ajlouny, supra,* is a clear holding to the contrary on this point.

A. France Was Not a Neutral Country at the Time Appellee Signed DSS Form No. 301. This Was Correctly Determined by the District Judge Based Upon Persuasive Evidence That This Political Question Had Been Decided in Appellee's Favor by the Executive Branch of the Government.

Although in the trial court the Government did not rely upon the proposition that the question of France's neutrality was a political question [Tr. 76, 88] and in fact accepted the proposition that evidence was admissible on this subject [Tr. 64, 92] nevertheless it seems clear from the incomplete record on appeal that the trial judge recognized that the question was a political one which had to be decided by the executive arm of the Government. See the record at page 90 where the following colloquy occurs:

> "The Court: Well, Mr. Garner, who determines in this country whether or not France was a neutral

country, the Department of State, the Department of War, the Selective Service System? Who determines it?"

And on page 92:

"The Court: I am not qualified, I am unble to make the determination whether or not France was a neutral nation."

And again on page 92:

"The Court: Do you think you can get any information from the Department of State or from Washington or from Selective Service as to whether or not France was a neutral nation in April 5, 1953?"

And in his Opinion the District Judge said in part:

"The problem before this Court to be solved is whether or not on the date application for relief from military service was filed by petitioner, to wit, September 20, 1949, (*sic*) France was a neutral country.

"On September 29, 1942, the Director of Selective Service classified France as a neutral, and because of this classification petitioner was required to sign Form 301. Petitioner now contends the Director of Selective Service was incorrect in classifying France as a neutral. At the trial petitioner presented a letter from the Department of State, Washington, D. C., dated August 7, 1946, signed by Walter Walkinshaw, Chief, Public Views and Inquiries Section, Division of Public Liaison, which stated: 'During World War II France's status was never that of a neutral country. France declared war against Germany September 3, 1939, and a state of war was declared to exist between France and Italy June 11,

> 1940. Armistice agreements were signed between France and Germany June 22, 1940, and between France and Italy June 24, 1940. At the present time France is in a state of armistice relations with Italy, pending the drawing up of an Italian peace treaty * * *'
>
> "Hence, we have one department of government holding France to be a neutral and another department of government holding to the contrary." [Tr. 14.]

Thus we see that the District Judge recognized that the question of France's neutrality or non-neutrality was a political one upon which he as a member of the judicial arm of the Government could not review the action of the executive arm and in the course of the trial he set himself about to determine what had been the position of the executive arm. Although the record is not complete we see that he received evidence of a clear expression by the State Department, *that branch of the executive arm which customarily determines such questions,* of the fact that "During World War II France's status was never that of a neutral country" [Ex. 4]. Additional evidence was received which showed that on April 4, 1943, the day upon which the appellee signed DSS Form No. 301, that the War Department of the executive arm of the United States was actually engaged in bombing the principal city of France and it was reported that 400 persons were killed, clearly an expression by that branch of the executive arm that France was not a neutral country [Ex. 1].

Further evidence of the attitude of the executive arm of our Government toward France's non-neutrality is re-

vealed in Exhibit 1 as shown by the fact that on November 8, 1942, diplomatic and consuler relations between the United States of America and the Vichy government were severed and were never thereafter restored [Ex. 1].

Now, courts have refused to determine for themselves certain types of questions which are classified as "political" and have accepted the answers given to them by the executive or legislative arms of the Government. One of these types of questions is the question of the neutrality of a foreign power. The trial judge recognized this and acted upon it.

But before a court can follow the determination of the executive arm of the Government on a political question the court has to find out what the political arm of the Government has decided on the question. That's exactly what the District Judge set out to do in this case.* We do not know what evidence was brought before the judge on the question of what the Executive arm had decided as to this political question. We do know that on July 28, 1952, the court allowed each side until September 1, 1952, to file additional evidence [Tr. 7]. We know that the court availed itself of reference to the *Encyclopaedia Britannica* [Tr. 15] to help itself decide this question, as it could properly do.

Fed. Rules of Civ. Proc., Rule 43(a);

Cal. Code Civ. Proc., Sec. 1875.

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*[Tr. 92]:

"The Court: Do you think you can get any information from the Department of State or from Washington or from Selective Service as to whether or not France was a neutral nation in April 5, 1953?"

Appellant is asking this Court to decide this factual question, *i. e.,* what the executive arm had decided about France's neutrality or non-neutrality, without this Court having before it the evidence upon which the District Court decided the question. This Court has time and again said that it would not do this and that in the absence of a complete record of the proceedings below, it is to be presumed on appeal that the evidence supported the decision of the trial judge.

Hardt v. Kirkpatrick, 91 F. 2d 875 (C. C. A. 9, 1937);

Williamson v. Richardson, 205 Fed. 245 (C. C. A. 9, 1913);

Fidelity & Deposit Co. of Maryland v. Lindholm, 66 F. 2d 56, 89 A. L. R. 279 (C. C. A. 9, 1933).

It is true as appellant argues that courts usually determine the question of what action the executive department of the Government has taken by judicial notice. But the fact that a matter can be judicially noticed does not mean that evidence is precluded on that point. It merely means that the party with the burden of proving that fact is relieved of proving it. It does not mean that the other party is precluded from offering evidence on the subject.

Ohio Bell Telephone Company v. Public Utility Commission of Ohio, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093;

In re Bowling Green Milling Co., 132 F. 2d 279;

United States v. Aluminum Company of America, 148 F. 2d 416.

Courts have properly made inquiry of the executive branch itself to resolve these questions.

Puente v. Spanish National State, 116 F. 2d 43, cert. den., 314 U. S. 627;

Jones v. United States, 137 U. S. 202, 11 S. Ct. 80, 34 L. Ed. 691.

We know that the trial judge looked to sources that do not appear in the partial record before this Court, as was proper for him to do. We do not know what other material came before him on the issue. How can this Court substitute its judgment for that of the trial court without the facts upon which the judgment was based?

B. The Selective Service Regulations Do Not Give Any Basis for Deciding the Question of France's Neutrality or Non-neutrality Differently Than Did the District Judge.

The original Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. Supp. 301-318) contained a provision authorizing the President, or his designated subordinate, "to prescribe the necessary rules and regulations to carry out the provisions" of the Act. The President delegated that authority to the Director of Selective Service by Executive Order No. 8545 (5 Fed. Reg. 3779). The Director of Selective Service exercised that authority and issued a whole body of regulations with periodic amendments. These were published in the Federal Register and periodically collected in the Supplement volumes of the Code of Federal Regulations.

On December 18, 1941, the Director issued a series of amendments to the regulations among which were certain definitions.

§601.1. *Definitions to govern.* The definitions contained in this part shall govern in the interpretation of the Selective Service Regulations.

§601.2. *Aliens.* (a) The term "alien" means any person who is not a national of the United States.

(b) The term "national of the United States" means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

(c) The term "citizen or subject of a neutral country" is used to designate any alien except (1) a citizen of a cobelligerent country or (2) an alien enemy.

(d) The term "cobelligerent country" means any country at war with a country against which the United States has declared war.

(e) The term "alien enemy" means a citizen or subject of any country who has been or may hereafter be proclaimed by the President to be an alien enemy of the United States. 6 Federal Register 6825. 32 C. F. R. 1941 Supp. 2796.

This is the first appearance of this definition and it remained unchanged throughout all of the period with which we are concerned. It is the only place in which the Director of Selective Service purported to exercise his authority to issue regulations on this subject.

The question of whether France was a neutral or non-neutral country within the meaning of the Regulations would depend then upon whether she was a cobelligerent, *as defined in the regulations.* That is, was she at war with a country against which the United States had declared war? She certainly was at war with Germany and Italy, being in a state of military occupation by the former power. And the United States had declared war against both of those countries on December 11, 1941.

So we see that under the definition laid down by the Selective Service Regulations France was not a neutral.

There was offered in evidence a copy of Local Board Memorandum No. 112, Subject: Classification of Aliens [Ex. D]. This in no way purports to be a part of the regulations nor does it purport to amend the regulations. It is an expression of opinion by the Director of Selective Service of a factual question, as is seen by the following language:

> "* * * To assist local boards in determining whether or not an alien registrant is a citizen or subject of a neutral country, there is attached to this release a list of all countries divided into three groups: (1) enemy countries, (2) cobelligerent countries, and (3) neutral countries. * * *"

In other words, the local boards still had the responsibility of applying the regulations and the Local Board Memorandum's list was to assist them in this.

These Local Board Memoranda are not part of the regulations as is seen by the fact that they were proven

in the case like any other document of a public body. In this connection perhaps this Court will indulge the appellee if he quotes from part of another Local Board Memorandum which does not appear in the record. That is Local Board Memorandum No. 1 as amended April 17, 1943:

"Subject: Regulations, Forms, and Memoranda Received by Local Boards from National Headquarters.

"1. Regulations, instructions and information.—the following are the principal media by which regulations, instructions and information will be transmitted by National Headquarters to local boards:

"(a) Selective Service Regulations.

"(b) Local Board Memoranda.

"(c) Selective Service Forms and Instructions for Forms. * * *."

Clearly these memoranda cannot change the Regulations, and they do not purport to do so, and the Selective Service System recognized the distinction.

II.

Where the Appellee Has at All Times Acted Toward the Appellant Openly and Consistently and Has Relied Upon the Advice of Appellant's Agent in Choosing His Course of Action, the Appellant Cannot Raise the Issue of Estoppel Upon Appeal.

A. The Record Shows That Appellee at All Times Told the Government That France Was Not a Neutral, and That He Did Just What the Government's Agent Told Him to Do in Order to Advise the Government of His Position and to Protect His Rights.

In order to maintain that a party has been estopped by his conduct at least four elements are necessary:

1. Ignorance on the part of the party claiming the estoppel of the matter asserted; 2. Silence concerning the matter where there is a duty to speak amounting to a misrepresentation or concealment of a material fact; 3. Action of the party relying on the misrepresentations or concealments, and 4. Damages resulting if the estoppel is denied.

James v. Nelson, 90 F. 2d 910 (1937);

Uhlmann Grain Co. v. Fidelity Deposit Company of Maryland, 116 F. 2d 105 (1941).

Or as this Court said in *Debold v. Inland Steel Company,* 125 F. 2d 369 (1942) at 375: "Estoppel arises when one has so acted as to mislead another and the one that was thus misled has relied upon the action of the inducing party to his prejudice."

None of the elements of estoppel are present in this case and in fact even the incomplete record here on appeal reveals clearly that there is no basis for a claim of estoppel.

(1) The United States of America was not ignorant of the matter asserted below by the appellee. First, all of the facts asserted by the appellee below were matters of public knowledge and information at the time that appellee executed his Form 301. Secondly, as of that time not only were these facts known but the appellee's position, namely, that France was not a neutral country, was made known by him to the Selective Service System [Tr. 46].

> "Of course, I tried to explain that France was not a neutral country and that I had good reasons to think it was not a neutral country, but this particular chairman of the board in my case said France was a Neutral and did not want to listen to any reasons and said 'You are a neutral. Sign Form 301.'"

And before appellee signed the Form 301 the record shows from the testimony of an official from the Selective Service System, Samuel J. Crawford, that he told exactly what his position was.

> "Q. Did you know at that time whether or not France was a neutral country? A. Well, I didn't know. I think that is a legal problem. I don't know whether it was or not. *I know that he didn't think it was.*
>
> Q. Did he tell you that, at that time? A. Yes." [Tr. 31.]

And on page 32:

> "Q. In other words, he always maintained to you that France was not a neutral country and despite the insistence of the Selective Service Board that France was a neutral, he always maintained to you that France at that time, in April, 1943, was not a neutral country? A. Well, he stated that it wasn't, but I didn't know."

(2) There was neither concealment by the appellee nor silence where there was an obligation to speak. Bussoz at all times advised the Selective Service System of this position [Tr. 31, 32, 46].

(3) There was no action by the United States in reliance upon any representation or concealment by the appellee sufficiently detrimental to the United States to justify the invocation of the doctrine of estoppel. Firstly, as point out above there was no concealment or misrepresentation but, secondly, it should be pointed out the record discloses that Bussoz had been discharged from the French army as unfit for military service on account of physical infirmity and that therefore the likelihood of his being called to service would in any event have been very slight. But more important than this is the fact that as soon as the circumstances changed that had caused him to fear that if he expressed his willingness to serve in the Armed Forces of the United States that he and his family would be victims of reprisal, namely, as soon as the liberation of Paris by the American troops in 1944 occurred, he immediately [Tr. 49] got another appointment with Mr. Crawford, the official of the draft board who had advised him in preparing his Form 301, and drafted the accompanying affidavit. He went to him, as Mr. Crawford said, "At a time when he wanted to then comply with this request *and join the United States army*" [Tr. 33]. Once again the official of the draft board prepared at Bussoz's request a statement of his then position which is set forth in the record in Exhibit E where he says in part:

> "In the last week the situation has changed in France to the point where the reasons I gave for my deferment and classification do not now exist and

> I would like very much now to have myself classified as being willing to serve in the armed forces of the United States and to be placed in whatever classification the Board cares to place me. * * *
>
> "I trust you will give the matter your immediate attention and will advise me if there is anything further I must do other than the request made in this letter."

The draft board chose to take no action on this letter but as is disclosed in the case of *Petition of Ajlouny,* 77 Fed. Supp. 327, 329, there was a provision under the Selective Service System for the withdrawal of a Form 301 when the circumstances requiring it changed. And the Selective Service System provided for the immediate induction of such registrants. Moreover, the withdrawal by the appellee of his objection to military service and his volunteering for immediate classification in whatever position the draft board wished to put him was not a mere empty gesture since it was expressly made with knowledge of his classification as being over age and therefore was a waiver of whatever deferment he might have had by way of such classification. Moreover, as of Thursday, November 9, 1944, the United States' casualties had numbered 509,195 and as of Thursday, September 6, 1945, the total casualties numbered 1,070,452.* In other words, more than half of the casualties suffered by the United States' forces took place after the date upon which Bussoz volunteered for military service.

(4) The appellant Government will suffer no damages if the estoppel is denied. It had the opportunity to induct

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*Facts on File, Vol. IV, 1944, New York.

the appellee during the war. The only present effect of granting the claim of estoppel would be to take away the citizenship of an educated, energetic, loyal American who came to this country primarily because of his devotion to the principles of American government and society. His business is of importance in the national defense of this country [Tr. 35 *et seq.*]. And he is to be deprived of his new citizenship because he sincerely believed that if he indicated that he was willing to serve in the armed forces of the United States he would endanger his family and when this danger had passed he volunteered immediately for service in the armed forces of the United States.

If estoppel could be raised at all it would be against the appellant whose agents first insisted that the Form No. 301 had to be signed if he was to indicate his unwillingness to be inducted on his Form No. 304 and whose agent, Mr. Crawford, prepared the affidavit which was to protect the appellee in his future efforts to obtain his citizenship. The recent case of *Petition of Berrini,* 112 Fed. Supp. 837 (1953), is very similar to this case on this point.

In the *Berrini* case a Swiss national signed the Form No. 301 after being advised by the Swiss Legation that the United States State Department had said that executing the Form No. 301 would not debar him from citizenship. The court in that case ruled that since he acted under the impression that he would not be debarred from citizenship he did not make an intelligent choice and so the Form No. 301 was a nullity.

In the present case the appellee acted on the instructions and advice of the Selective Service officials as to what he could do to preserve his family's safety and his own chances of future United States citizenship.

All of the arguments advanced by appellant to support his claim of estoppel could have been urged in the trial court, certainly the District Judge had no desire to admit an undesirable alien. Such record as appears clearly supports the fact that appellee is a thoroughly desirable citizen.

The comparison with *In re Molo,* 107 Fed. Supp. 137, is certainly not helpful to this Court. Molo was an Iranian citizen. Nothing happened to change the Iranian situation at the time Molo sought to withdraw his Form No. 301. In the case of the appellee here he did everything he knew to do to withdraw his Form No. 301 just as soon as he could after the situation changed and France was liberated. Judge Westover had the opportunity to judge of appellee's sincerity and motives and clearly decided, as had the Selective Service official, that they were of the highest. The age regulations changed many times during the war, both up and down. Appellee had no assurance that his age classification would remain the same and his letter was clearly a waiver of any rights he might have had by virtue of such classification.

B. The Record Shows That the Issue of Estoppel Was Not Raised in the Trial Court; It Cannot Be Raised Here on Appeal for the First Time.

There is nothing in the partial record here on appeal to show that at any time in the trial court the appellant urged the issue of estoppel and in fact the record discloses numerous statements to show that the case was tried under an entirely different theory.

> "The Court: Mr. Garner, are you willing to admit that the real issue here, on this phase of the case, is whether or not France was a neutral country?
>
> Mr. Garner: I think that is what it hinges on here, your Honor.
>
> The Court: Let us assume that it was not a neutral country.
>
> Mr. Garner: Then if it wasn't clearly under the Selective Service Act the Form 301 was a nullity." [Tr. 62.]

And again:

> "The Court: Well, Mr. Garner is willing to admit or willing to stipulate that the real issue here is whether or not France was a neutral nation."

It is a well established principle of law that appellate courts will not give consideration to issues not raised in the court below, and this principle is as applicable to a review of a naturalization petition as any other matter.

Tutum v. United States, 270 U. S. 568;

Delgadillo v. Carmichael, 332 U. S. 388 (1947).

This would be true of any issue but it is particularly applicable here. Estoppel is a question of fact.

Quon v. Niagara Fire Ins. Co. of N. Y., 190 F. 2d 257 (C. C. A. 9, 1951);

Dickenson v. General Accidental Fire and Liability Assurance Corp., 147 F. 2d 396 (C. C. A. 9, 1945).

Here we do not have the facts upon which to decide it if it were within the province of an appellate court to decide questions of fact, which it is not.

Wherefore, appellee respectfully urges that the clearly correct judgment of the District Court should be affirmed.

Respectfully submitted,

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